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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No.

JULIUS HYMAN, *Petitioner,*

v.

VELSICOL CORPORATION, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS AND BRIEF IN SUPPORT.

To the Honorable, The Chief Justice of The United States, and to The Associate Justices of The Supreme Court of The United States:

Julius Hyman, hereinafter called Petitioner, respectfully petitions that a writ of certiorari be issued to review the judgment of the Supreme Court of the State of Illinois, which reversed a judgment of the Appellate Court of the State of Illinois, First District, which in turn reversed a decree of the Superior Court of Cook County. This decree ordered Petitioner to assign and transfer to Respondent certain applications for United States Letters Patent, en-

joined Petitioner from using or disclosing the processes covered by these applications, and from using or disclosing any processes, formulas, products, methods, or techniques discovered by or made known to Petitioner while he was in the employ of Respondent.

OPINIONS BELOW.

The opinion of the Supreme Court of Illinois appears in the record. (R. 285). It has not as yet been officially reported. The opinion of the Appellate Court of Illinois appears in the record (R. 261) and is officially reported (338 Ill. App. 52). The decree of the Superior Court appears in the record (R. 81) and the Trial Court's written pronouncement overruling exceptions to the master's report appears in the record. (R. 84). These were not officially reported.

JURISDICTION.

This proceeding, for a mandatory and a prohibitory injunction, was filed in the Superior Court, Cook County, on October 15, 1946. (R. 1). It requested the relief granted by the master and the Superior Court. The judgment of the Appellate Court of Illinois reversing the decree of the Superior Court and directing dismissal of the complaint for want of equity was entered on June 20, 1949. (R. 259). Respondent filed a petition for leave to appeal which was allowed by the Supreme Court of Illinois on September 15, 1949. (R. 283). After entry of the judgment of the Supreme Court of Illinois, on February 11, 1950, and within the time allowed therefor, Petitioner filed a petition for rehearing (R. 301) which was denied on March 20, 1950. (R. 327). On March 22, 1950, the Supreme Court of Illinois ordered a stay of its mandate for a period of thirty days pending disposition of this petition for writ of certiorari in the United States Supreme Court. (R. 328). Jurisdiction of this Honorable Court is invoked under 28 U.S.C. § 1257, Subdivision 3.

STATEMENT OF THE CASE.

This suit involves four patent applications filed in Petitioner's name as inventor and now pending in the United States Patent Office of a value of $4 to $5 million. They include an insecticide which has been found to be the best for grasshopper control in the world. (R. 243-4, 294). It is many times more potent than DDT. (R. 138, 146).

The suit seeks a mandatory injunction requiring Petitioner to assign the applications to Respondent, and a prohibitory injunction perpetually restraining Petitioner from using or disclosing the processes covered by the applications to anyone other than Respondent, and from using or revealing any other process, formula, method or product discovered by Petitioner or disclosed to him while in Respondent's employ. (R. 1).

The Illinois Supreme Court found as facts that the patent applications are void. It ordered the full relief as prayed for and directed Petitioner to assign the applications to Respondent. (R. 285).

As a practical result of this holding, the insecticide in question may be manufactured only in Illinois, where Respondent's plant is located. (R. 6, 7).

Petitioner is a chemist with extensive training. (R. 100-1). In 1930 he believed that he had two patentable ideas relating to petroleum polymers, a by-product of gasoline refining (R. 102-3) and estimated that $100,000 would be required to finance the venture.

As a result of negotiations with a cousin, one Joseph Regenstein who financed the venture, Respondent company was formed in 1931 to exploit, manufacture and sell Petitioner's two ideas which were later patented. Respondent corporation was capitalized at $20,000. Petitioner received 20% of the stock in return for the assignment to Respondent of his two polymer patent applications. Petitioner was informed that his salary was to be $40 a week. (R. 104, 227, 231).

At the meeting at which the corporation was formed, one of Regenstein's attorneys asked Petitioner to sign a patent assignment agreement relating to future inventions. Petitioner refused stating that the determination that the company was to have only a $20,000 capitalization, that he was to receive only 20% of the stock and a salary of only $40 per week, made him unwilling to assign future inventions. (R. 116, 228, 231, 232).

The purpose of the formation of the corporation was restricted to the exploitation of the original two patent applications. (R. 150, 179). Respondent's principal witness, a director and officer of the Company so testified. (R. 179).

The company was entirely managed by Petitioner and Regenstein, Hyman carrying on the day-to-day management.

By 1943 Respondent corporation was a profitable venture. Net profits of about $300,000 before taxes were realized. (R. 226).

Up until 1943, Petitioner made a number of additional inventions in the field of petroleum polymers, many of which were used by the company. (R. 235). As Petitioner filed patent applications, he assigned them to the company. He testified that he did so not because of any legal obligation but because of his desire to make the venture a success. (R. 123, 234).

In the fall of 1943, because of Respondent's then assured success, Petitioner told Regenstein he would no longer assign inventions to the company unless some adjustment was made for his increased participation. (R. 123, 234). Regenstein said that something would be worked out to Petitioner's satisfaction. (R. 79). Petitioner then made additional assignments to Respondent. (R. 124, 204). Nothing was done to increase Petitioner's participation. (R. 125, 139, 267).

During the following year, 1944, Petitioner assigned and directed certain research work to three chemists employed by Respondent under Petitioner's direction. A product was

evolved known as "237", its laboratory number. (R. 135, 202, 210). It was recognized that it was probably an efficient insecticide. Two patent applications were filed and signed by the three chemist employees. They were assigned to Respondent. (R. 199, 210).

Testing of "237" showed that it was too volatile for practical purposes. Petitioner directed further experiments. (R. 136-8, 253). A formula known as "1068" was evolved which proved practical. Four applications including "1068" were filed in Petitioner's name, the last of these on February 16, 1946. (R. 137, 140-1, 197, 199). Applications were also filed in foreign countries. (R. 16, 18). Foreign patents have issued in 1946 and 1947.

These four applications are the subject matter of this suit. The Supreme Court of Illinois found that they did not cover an invention of Petitioner, stating:

> "We believe the record fairly establishes that a number of chemists employed by appellant, including appellee, had part in discovering or inventing the component parts of 1068 and other insecticides through laboratory tests and experiments conducted by appellant, and that 1068 cannot be said to result exclusively through the brain of appellee." (R. 294)

Respondent has marketed "1068" which has been in use by the public since 1946. (R. 18, 142, 144, 172).

Respondent demanded that Petitioner assign to it the applications covering "1068". Petitioner refused contending that he was under no obligation to do so (R. 144-5) and would not unless the promise to increase his participation was kept. (R. 217, 238). On September 13, 1946, Petitioner resigned from the company at Regenstein's request.

On October 15, 1946, this suit was filed. In one count of the complaint, Respondent relied upon a purported written agreement signed by Petitioner to the effect that he would assign all future patents to the company. In the other, it relied upon the facts and relationship of the parties as constituting the right to the relief sought. (Opin-

ion, R. 291). All of the allegations of the complaint were sworn to except the allegation that Petitioner had executed such an alleged written agreement. This was stated on "information and belief". (R. 10, 20).

This was the first time in the controversy that anyone charged that Petitioner entered into such an agreement. (R. 238). Respondent's witnesses admitted that they never saw Petitioner sign such an agreement, but they claimed they had seen such a document in Respondent's files. (R. 70, 171, 189).

The ordinary employees of Respondent did sign secrecy agreements. (R. 290). The top officers, such as Petitioner, did not. (R. 172, 186). Nowhere in the minutes of Respondent corporation is reference made to a secrecy agreement signed by Petitioner. (R. 176).

On February 26, 1947, an official publication of the United States Department of Agriculture carried a complete description of the structural and empirical formula for "1068". This publication is attached hereto as Exhibit "A".

THE OPINION OF THE SUPREME COURT OF ILLINOIS.

The Supreme Court of the State of Illinois granted the relief prayed for in Respondent's complaint. It ordered an assignment of the patent applications for "1068" which it had found to be void. It enjoined Petitioner perpetually from using or disclosing processes, formulas, methods or products covered by the applications for "1068" although there had already been public disclosure, use and sale of the product. It enjoined Petitioner perpetually from using or disclosing any process, formulas, method or products invented or made known to Petitioner during his employment by Respondent.

This sweeping injunction was ordered without regard to whether any of these processes were known to the public. Since Petitioner's experience for the past 15 years had been

in Respondent's employ, the injunction prevents him from effectively engaging in his profession as a chemist and destroys the career of a scientist of admitted ability.

The Supreme Court of Illinois in ordering the relief as prayed for did so on the finding that there was a secrecy agreement as alleged on information and belief. This finding was made in spite of the facts that the alleged agreement was not produced; the alleged attesting witnesses were not called by Respondent; no one testified that he had seen Petitioner sign such an agreement.

The Court below also inferred a confidential relationship between the parties which dictated the relief sought in spite of the fact that there had already been full public disclosure, use, and sale of "1068" and in spite of the fact that the Court found the patent invalid.

This holding effectively insulates Respondent from competition in manufacturing and marketing this important and valuable insecticide. Petitioner is obviously the only present competitive threat. Yet he is enjoined from competing in the marketing of a product already disclosed to the public and on which patent applications have been found void. The effect of the Supreme Court of Illinois holding is to render "1068" a duly patented process as to Petitioner alone while deciding that as to the rest of the world it is a free and open process. It is permitting Respondent to perpetrate a fraud on the federal patent laws and the public.

QUESTIONS PRESENTED.

1. Whether a state court, having found a patent application pending in the United States Patent Office void, may order an assignment of the application, thereby enabling a manufacturer to perpetrate a fraud against the federal patent laws and the public.

2. Whether, under color of the federal patent laws, a state court may insulate a corporation against competition from a former employee in the manufacture and sale of an

unpatentable product the process for which has been made public.

3. Whether a state court may deprive a man of his right freely to engage in his profession and thereby, contrary to the public interest, insulate a corporation from competition in the manufacture and sale of any of its formulas, processes, methods, or products regardless of whether they have been either disclosed to the public or patented.

4. Whether a state court may usurp the exclusive jurisdiction of the United States Patent Office and the federal courts to declare a patent application invalid.

REASONS FOR GRANTING THE WRIT.

1. The applications under consideration are valued at $4 to $5 million. They cover an insecticide many times more efficient than DDT and one of the most efficient now known. It has already been determined the most effective for grasshopper control. The Court below has insulated Respondent from competition in its manufacture and sale. Conflict on the questions presented under the federal patent laws is unlikely.

2. The Court below usurped the exclusive jurisdiction of the United States Patent Office and the federal courts to find the subject patent applications void. The holding enabled Respondent to insulate itself from competition and perpetrate a fraud against the federal patent laws and the public.

3. The Court below usurped the exclusive jurisdiction of the United States Patent Office and the federal courts to declare the subject patent applications void, and gave effect to this determination by ordering them assigned to Respondent.

4. The Court below deprived Petitioner of the constitutional right to engage freely in his profession. It did so by enjoining him from using or disclosing the subject matter

of the patent applications in question or any other processes made known to him while in the employ of Respondent with no regard as to whether any of the processes were a matter of public knowledge or patented.

5. In ordering the relief granted, the Court below has decided federal and constitutional questions of substance contrary to applicable decisions of this Honorable Court and contrary to the public policy of free and competitive access to technological skills and "know-how".

BRIEF IN SUPPORT OF PETITION.

I. The Importance of the Patent Questions Presented and the Improbability of Conflict.

It has been stated that the process under consideration is valued at $4 to $5 million, is many times more efficient than DDT, and is the most effective insecticide for grasshopper control. The Court below has prevented competition with Respondent's Illinois concern. Conflict on the questions presented under the federal patent laws is improbable.

Precedent for granting the writ is found in at least two cases. In *Muncie Gear Works* v. *Outboard Marine and Mfg. Co.*, 315 U. S. 759, 766, it was said:

> ". . . we granted certiorari in view of the questions presented and because the patent dominates a substantial portion of the industry so concentrated in the Seventh Circuit that litigation in other circuits, resulting in a conflict of decisions is unlikely."

Similarly in *Schriber-Schroth Co.* v. *Cleveland Trust Co.*, 305 U. S. 47, at 50, the Court said:

> "We later granted certiorari . . . notwithstanding the doubtful validity of the patents, litigation elsewhere with a resulting conflict of decision was improbable because of the concentration of the automobile industry in the Sixth Circuit."

Furthermore, this Court will not be limited even where the federal questions were not sharply articulated below. As was stated in the *Muncie Gear Works* case, *supra*, at 768:

> "We think the conclusion is inescapable that there was public use, or sale, of devices embodying the asserted invention, more than two years before it was first presented to the Patent Office. We are not foreclosed from a decision under Section 4886 on the point by the obscurity of its presentation in the courts below. This issue has been fully presented to this Court by the petition for a writ of certiorari and in subsequent briefs and argument; and there is not the slightest indication that respondents have been prejudiced by such obscurity. To sustain the claims in question upon the established and admitted facts would require a plain disregard of the public interest sought to be safeguarded by the patent statutes, and so frequently present but so seldom adequately represented in patent litigation."

II. The Court Below Improperly Usurped the Jurisdiction of the Patent Office and the Federal Courts to Enable Respondent to Perpetrate a Fraud Against the Patent Laws and the Public.

That the determination of patent questions rests solely in the jurisdiction of the United States Patent Office and the federal courts needs no citation of authority.

When a state court invades such exclusive federal jurisdiction and gives effect to the invasion by enabling a litigant to achieve an imposition on the public contrary to federal law, this Honorable Court has exercised its jurisdiction. In the following cases, this Honorable Court has reviewed decisions of state courts to avoid a result contrary to federal policy. There are many others:

Anderson v. *Carkins,* 135 U. S. 483
Nutt v. *Knut,* 200 U. S. 13
Illinois C. R. Co. v. *McKendree,* 203 U. S. 514
Sylvester v. *State of Washington,* 215 U. S. 80

Ferris v. *Frohman*, 223 U. S. 424
St. Louis I. M. and S. R. Co. v. *Starbird*, 243 U. S. 592
Cf. *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173, involving the federal patent statutes.

In the *Nutt* case, *supra*, 200 U. S. at 18, the Court said:

> "A party who insists that a judgment cannot be rendered against him consistently with the statutes of the United States may be fairly held, . . . to assert a right and immunity under such statutes, although the statutes may not give the party himself a personal or affirmative right that could be enforced by direct suit against his adversary. Such has been the view taken in many cases where the authority of this court to review the final judgment of the state courts was involved."

In the *Anderson* case, *supra*, 135 U. S. at 485:

> "Hence the jurisdiction of this court cannot be doubted. Murdock v. Memphis, 20 Wall. 590. It is immaterial that the state court considered the case to be within the provisions of certain state statutes. The grasp of the federal statute must first be released. The construction and scope of that are federal questions . . ."

The holding below has reached a result contrary to federal law and policy. The Court found that Petitioner did not invent "1068". It was the invention of "a number of chemists". A patent issued to one person when in fact the process was invented by more is void. *Atlantic Works* v. *Brady*, 107 U. S. 192. The rule was stated in *Shreckhise* v. *Ritchie*, 160 F. (2d) 593 (4th Cir. 1947) at 595:

> "It is well settled that . . . patents can be granted only to the true inventors of the invention and must be issued in the name of all of the inventors; . . . when a patent is issued to one person for something which was jointly invented by several the patent is invalid."

There has been public disclosure, use and sale of "1068" for more than one year. The statute of limitations has

run against the various inventors to make joint application. The statute reads in part (35 U.S.C. § 31):

> "A person who has invented or discovered any new and useful art . . . not in public use or on sale in this country for more than one year prior to his application . . . may . . . obtain a patent therefor."

Disclosure and public use and sale for longer than the statutory period consists in:

1. The publication of the structural and empirical formula in Exhibit "A";

2. Public use and sale since 1946;

3. Applications requiring the fullest description filed here and abroad in 1945 and 1946;

4. Issuing of foreign patents in 1946 and 1947.

Smith and Griggs Mfg. Co. v. *Sprague*, 123 U. S. 249
Andrews v. *Hovey*, 123 U. S. 267
International Tooth-Crown Co. v. *Gaylord*, 140 U. S. 55
General Electric Co. v. *Wabash Appliance Corp.*, 304 U. S. 364.

Nor can the subject application be cured by amendment. The United States Patent Office does not allow an application filed by one as the inventor to be amended to include other inventor-applicants. *Ex Parte Benes* (1925) C.D. 75; 399 O.G. 499. *A fortiori*, this is true when the subject matter of the applications has been publicly known for more than a year (35 U.S.C. § 31).

"1068" is thus in the public domain. This Honorable Court has many times held that a process in the public domain may be marketed and sold by anyone. *Kellogg Co.* v. *National Biscuit Co.*, 305 U. S. 111; *Singer Mfg. Co.* v. *June Mfg. Co.*, 163 U. S. 169. The Court below, however, has held that Petitioner may not market and sell "1068". Thus Respondent, under color of the patent laws, is effec-

tively and perpetually insulated against competition from its strongest competitive threat. Petitioner is familiar with the process and could bring it to the public in a competitive market. In the *Muncie Gear Works* case, *supra*, page 9, the Court granted certiorari to cure such a ". . . plain disregard of the public interest sought to be safeguarded by the patent statutes . . ." (315 U. S. at 768).

III. The Court Below Gave Further Effect to Its Usurpation of Exclusive Federal Jurisdiction by Ordering Assignment of Void Patent Applications.

The Court below ordered this action contrary to a controlling decision of this Court which held such an order improper and contrary to the public policy of the patent laws. *Kennedy* v. *Hazelton*, 128 U. S. 667, was a suit similar to the one at bar asking specific performance of a written contract to assign future patents. The patent was found void. It was said:

> "A court of chancery cannot decree specific performance of an agreement to convey property which has no existence, or to which the defendant has no title.
>
> * * *
>
> "A patent which is not supported by the oath of the inventor but applied for by one who is not the inventor, is unauthorized by law and void, and, whether taken out in the name of the applicant or of any assignee of his, confers no rights as against the public.
>
> * * *
>
> ". . . its only possible value or use to the plaintiff would be to enable him to impose upon the public by asserting rights under a void patent". (128 U. S. at 669-70).

As a further matter the Court below erred in directing specific performance of an alleged written contract. No document was produced, no attesting witnesses appeared; Respondent's witnesses denied having seen Petitioner execute it. The holding is directly contrary to the holding of

this Court which requires "clear and satisfactory" proof before ordering specific performance of an alleged contract to assign future inventions. *Dalzell* v. *Dueber Watch-Case Mfg. Co.*, 149 U. S. 315, 325.

IV. The Injunction Below Restraining Petitioner from Using or Disclosing "1068" or Any Other Process, Formula, Method or Product Discovered by or Made Known to Petitioner While in Respondent's Employ Unconstitutionally Deprives Petitioner of His Right to Practice His Trade and is Contrary to Public Policy.

The right of a man to practice freely a trade or profession is safeguarded by the Constitution. It is held that interference with that right is an unconstitutional deprivation of liberty. *Allgeyer* v. *Louisiana*, 165 U. S. 578; *Smith* v. *Texas*, 233 U. S. 630.

The order of the State Court below is such an invasion. It has been demonstrated that "1068" is in the public domain. Anyone has the right to manufacture and sell it. The Court below, however, has deprived Petitioner of that right through its order.

An injunction against disclosure of an unpatented process will issue only where the process is a secret, not where it has been disclosed. *DuPont de Nemours Powder Co.* v. *Masland*, 244 U. S. 100; *American Dirigold Corp.* v. *Dirigold Metals Corp.*, 125 F. (2d) 446 (6th Cir., 1942); *DiFilippis* v. *Chrysler Corp.*, 53 F. Supp. 977 (S.D.N.Y. 1941); *Smoley* v. *New Jersey Zinc Co.*, 24 F. Supp. 294 (D.N.J. 1938). In the *Smoley* case the rule was stated at 300:

> "A duty not to use an idea already known cannot be created by virtue of the fact that one makes a confidential disclosure of that idea. Masland v. DuPont de Nemours Powder Co., 3 Cir., 224 F. 689, 693, reversed on other grounds, 244 U. S. 100, 37 S. Ct. 575, 61 L. Ed. 1016. If the rule were not so restricted it is obvious that by disclosing an idea under delusions of confi-

dence, the person making the disclosure could thereafter prevent the confidante from subsequently making use of it, even though the idea was well-known prior to the date of the disclosure and open to the use of all others in the world."

The Court below went further. It not only restrained Petitioner from using or disclosing "1068" which is in the public domain. It enjoined Petitioner from using *any* product, process, formula, or method discovered or made known to Petitioner during his 15 years employment by Respondent. This was ordered without regard to whether any or all of these processes are in the public domain. The injunction obviously prevents Petitioner from practicing his profession since the record shows that the major part of his experience, 15 years, was gained during his employment by Respondent. This is an unconstitutional deprivation of liberty which should be corrected by this Honorable Court—particularly in view of the uncontradicted potential of Petitioner to contribute to public knowledge and welfare in the field of chemistry.

The Court below has done more than unconstitutionally deprive Petitioner of his trade and to subvert the federal statutes by protecting Respondent from competition in the use and sale of the process "1068" and other products already in the public domain.

It has raised other important questions which have not been decided by this Honorable Court. On the basis of scanty evidence it determined to enjoin Petitioner from using or disclosing any processes invented by him or made known to him while he was in Respondent's employ. It restricted the production of the insecticide in question and all of Respondent's other processes and granted to Respondent a monopoly.

A circuit court has recently stated that injunctions restricting the use of so-called trade secrets and tying up "know-how" are contrary to public policy. *Reynolds Metals Co.* v. *Skinner*, 166 F. (2d) 66 (6th Cir. 1948). But

a decision by this Honorable Court definitively establishing the lengths to which a resourceful corporation may go to monopolize "know-how" under the guise either of the federal patent laws or so-called secrecy agreements, written or inferred, is not to be found. As this Honorable Court has set the pattern for a strict construction of the patent monopoly, so, we respectfully suggest, should it set the pattern for widespread utilization of "know-how". This Court has declared in *Scott Paper Co.* v. *Marcalus Mfg. Co.*, 326 U. S. 249, 255, that the overriding patent policy is

> ". . . full disclosure for the benefit of the public of the manner of making and using the invention . . ."

With respect to "know-how" in a highly mechanized and complex industrial society, a similar over-riding policy of disclosure should be evolved. Certainly a chemist of Petitioner's admitted ability should not be restrained from bringing to the public the results of his work in the absence of certain and definitely proved agreements to the contrary. Such agreements have not been shown in this case. The lower court inferred them. The practical result of the lower court's holding has been to grant to Respondent a monopoly in this important field contrary to public policy. We submit that this Honorable Court should review the problem of restricting "know-how". It has perhaps become more important than the use of the patent monopoly itself in the ever-increasing concentration of productive facilities. This case presents an appropriate opportunity for the Court to consider the problem.

CONCLUSION.

The subject matter of this litigation is an important one involving the federal statutes. Conflict is improbable. The Court below has invaded exclusive federal jurisdiction and given effect to the invasion by enabling Respondent to subvert the policy of the federal patent laws. It has further unconstitutionally taken from Petitioner the right to prac-

tice his profession. The decision below has decided these questions and contributed to the ability of resourceful corporations to control and restrict the use and development of technological skills and "know-how" contrary to public policy.

WHEREFORE, it is respectfully submitted that this petition should be granted.

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April 19, 1950.